

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Civ. Action 95-133 (RCL)
	)	
	)	
UNITED STATES DEPARTMENT	)	
OF COMMERCE,	)	
	)	
Defendant.	)	
	)	
_____	)	

**MEMORANDUM AND ORDER**

Now before the Court is a motion by the plaintiff to take discovery of electronic communication between the White House, the Department of Commerce, and the Democratic National Committee. The defendant opposes this motion. For the following reasons, the Court GRANTS the plaintiff's motion.

**BACKGROUND**

This case began as--and still remains--a FOIA case. In 1994, Judicial Watch filed a FOIA request with the Department of Commerce ("DOC") for documents on how the DOC selected participants for several trade missions led by the late Secretary of Commerce Ron Brown. Although the DOC produced some records, they intentionally withheld several key documents. As this noncompliance eventually

became public, the DOC sought to truncate its embarrassment by moving for summary judgment against itself. In an opinion dated December 22, 1998, the Court denied the DOC's motion, granted partial summary judgment in favor of Judicial Watch, and ordered the DOC to conduct a fresh search for responsive documents. Of particular relevance here, the Court also permitted Judicial Watch to take discovery on the "destruction or removal of documents after its . . . FOIA request was filed." *Judicial Watch v. United States Department of Commerce*, 34 F. Supp. 28, 45 (D.D.C. 1998).

In the instant action, Judicial Watch seeks to discover White House e-mails "concerning the likelihood . . . that documents exist . . . regarding the sale of taxpayer-financed trade mission seats in exchange for political campaign contributions." Brief for Plaintiff at 1.

### **ANALYSIS**

Whether accidentally or intentionally, the plaintiff misstates the proper scope of discovery in this case. The plaintiff is not-- and will not be--permitted to fish for documents regarding the sale of trade-mission seats. But this is not to say that the plaintiff may not have any discovery. Rather, the plaintiff may discover records that might foreseeably contain information suggesting that the DOC was withholding documents from the plaintiff during the

plaintiff's first FOIA request. Thus, the Court must determine if the plaintiff's request for limited email discovery falls within these parameters. The Court finds that it does.

There is credible evidence that communications did occur between the DOC, the White House, and the DNC on issues pertinent to this case. See Affidavit of Nolanda Hill, July 28, 1998, at ¶¶ 7, 9. It goes without saying that email is, in the current day and age, an integral part of the workplace. Not only is it often used as a primary means of communication, it also used to memorialize previous conversations and transfer records in bulk. Given this aspect of email, and the ample evidence that communications occurred with the White House, it is quite logical to conclude that at least some of the communications were in electronic form.

The Court recognizes that the DOC has already been ordered to produce all emails exchanged "with the Democratic National Committee and/or the White House which refer or relate to plaintiff's FOIA requests." Order of August 30, 1996 at 2. It might be thought that this order would obviate the need for discovery from the White House because any message to or from the White House would be in the DOC's email records which, presumably, have already been fully produced. However, this overlooks the possibility that the DOC may have destroyed or secreted emails which either (1) contained information covered under the FOIA search, or (2) contained information relating

to an evasion of the FOIA request. A review of selected White House emails would reveal whether the DOC fully complied with the Court order to turn over all of the relevant documents and emails. Thus, discovery of White House emails would not be duplicative, but serve as a check on the DOC's production thus far.

In permitting discovery of White House emails, the Court is adamant that the search remain as narrow as possible. Thus, the plaintiff shall *only* attempt to discover information that would reasonably lead to evidence that the DOC was not complying with its first FOIA request. As well, the plaintiff *shall not* attempt--as its brief suggests--to search for information relating to whether the White House sold trade mission seats for political favors.

This Court has learned from experience that cases as contentious and high-profile as this one demand explicit ground rules. Thus, to ensure that the discovery on this matter is promptly and properly executed, two orders are proper: First, the parties are ordered to file a joint proposal on the schedule and procedures to be followed. If the parties cannot agree on a single proposal, each may submit their own proposal. The proposal(s) shall be filed within 30 days of this date. Second, the defendant's counsel is ordered to meet with the defense counsel in *Alexander v. FBI*, Civ. A. No. 96-2123, 97-1288 (D.D.C.) (Lamberth, J.) to obtain an understanding of the White House email system, including its hardware, software, and

search capabilities. This meeting shall occur within 15 days of this date. The Court will be particularly impatient with any government excuse predicated on a lack of understanding of the White House email system.

Finally, this Court, not Magistrate Judge Facciola, will directly supervise the email discovery on this matter.

**CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion for leave to take limited e-mail discovery [632-1] be GRANTED; further, it is

ORDERED that the parties shall comply with the discovery instructions laid out above.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE